

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX

IN THE MATTER OF:

Order No. 92-10

Hawaiian Western Steel Ltd. Inc.,  
Respondent

)  
)  
) ADMINISTRATIVE ORDER  
) ON CONSENT  
) PURSUANT TO SECTIONS 106 AND  
) 104 OF THE COMPREHENSIVE  
) ENVIRONMENTAL RESPONSE,  
) COMPENSATION, AND  
) LIABILITY ACT OF 1980  
) AS AMENDED, 42 U.S.C.  
) Sections 9606 and 9604

PREAMBLE

This Consent Order ("Order") is issued on the date set forth below to the Respondent pursuant to the authority vested in the President of the United States by Sections 106(a) and 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. Sections 9606(a) and 9604(e), as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499 ("CERCLA"), which authority has been delegated to the Administrator of the United States Environmental Protection Agency ("U.S. EPA" or "EPA") by Executive Order No. 12580, January 23, 1987, 52 Federal Register 2923, further delegated to the Assistant Administrator for Solid Waste and Emergency Response and to the EPA Regions by U.S. EPA Delegations Nos. 14-14-A and 14-14-B, and further delegated to the Director, Hazardous Waste Management Division, Region 9 ("Director").

The State of Hawaii has been notified of the issuance of this Order as required by Section 106(a) of CERCLA, 42 U.S.C. Section 9606(a).

This Order requires the Respondent to undertake and complete emergency removal activities to abate an imminent and substantial endangerment to the public health and welfare or the environment that may be presented by actual and threatened releases of hazardous substances.

JURISDICTION

1. The Respondent agrees not to challenge or contest the EPA's jurisdiction to issue and enforce this Consent Order against the Respondent (including the Court's personal jurisdiction over the Respondent) or the authority or jurisdiction of the Regional Administrator or other officials to

1 issue or enforce this Order, and agrees not to contest the  
2 validity of this Order or its terms.

3 DISCLAIMER

4 2. By signing this Consent Order and taking actions  
5 under this Order, Respondent does not indicate that it agrees  
6 with the findings of fact and conclusions of law set forth  
7 herein. The participation of Respondent in this Order shall not  
8 be considered an admission of liability and this Order is not  
9 admissible in evidence against Respondent in any judicial or  
10 administrative proceeding other than a proceeding by the United  
11 States to enforce this Consent Order or a judgment relating to  
12 it.

13 PARTIES BOUND

14 3. This Consent Order shall apply to and be binding  
15 upon EPA, the Respondent, the agents, successors, assigns,  
16 officers, directors, trustees, beneficiaries and employees of the  
17 Respondent, any persons controlled by the Respondent and such  
18 persons' agents, successors, assigns, officers, directors,  
19 trustees and employees. No change in the ownership or legal  
20 status of the Respondent or of all or any portion of the Site,  
21 nor any sale, transfer or distribution of assets by the  
22 Respondent, shall alter the Respondent's obligations under this  
23 Consent Order.

24 4. During the period this Order is in effect, the  
25 Respondent shall provide a copy of this Consent Order to any  
26 subsequent owners or operators of all or any portion of the Site  
27 and to each person into which they are merged or to which a  
28 material portion of their stock or assets are sold, transferred  
29 or distributed, and to any other person that succeeds to their  
30 rights or liabilities. The Respondent shall notify EPA on or  
31 before the date of any such change in ownership or operation or  
32 any such merger, sale, transfer, distribution or succession.

33 5. The Respondent shall provide a copy of this Consent  
34 Order to all contractors, subcontractors, laboratories and  
35 consultants retained to conduct any work performed under this  
36 Consent Order on or before the later of (a) the day 14 calendar  
37 days after the effective date of this Consent Order and (b) the  
38 date of retaining their services. The Respondent shall condition  
39 any such contracts upon compliance with this Consent Order.  
40 Notwithstanding the terms of any contract, the Respondent is  
41 responsible for compliance with this Consent Order and for  
42 ensuring that all persons listed in the first sentence of this  
43 paragraph comply with this Consent Order.

1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4

6. The site that is the subject of this Order (the "Site") consists of three distinct areas: the Plant Area, the RCRA Landfill Area and the Beach Area.

8. The second area of the Site (the "RCRA Landfill Area") is located less than one mile north of the Plant just north of Malakole Rd. HWS used the RCRA Landfill Area to dispose of waste from the Plant containing lead and cadmium. Most of the waste is located on the west side of Hanua St. but some is under and south of Hanua Rd.

10. The Plant consists of a secondary steel production mill and associated structures. At the Plant, HWS melted scrap metal in an electric arc furnace, and rolled the output to produce steel reinforcing rods (known as "rebar"). The emissions control apparatus on the Plant's electric arc furnace collects the furnace's emissions into a stack or flue. The emissions, electric arc furnace dust, are channelled into a "baghouse" where they are collected by a series of baffles and deposited into large bags. After the electric arc furnace dust is collected it is referred to as "baghouse dust." The Plant furnace is not now in operation and the Plant has ceased most operations.

11. Bags of baghouse dust are and have been kept in the Plant Area. Some such bags have been torn and some have been open. In addition, containers of material that HWS removed from the RCRA Landfill Area for testing (called "Pilot Project" material by HWS) are kept in the Plant Area. The bags and containers have been kept on the earth with no floor beneath them. Loose baghouse dust and "Pilot Project" material are present on the ground in the Plant Area. Tests have indicated

1 that the baghouse dust and "Pilot Project" material contain lead  
2 and cadmium in high amounts.

3 12. Beginning not later than 1974, HWS disposed of  
4 approximately 40,000 tons of waste from the Plant at the RCRA  
5 Landfill Area, with at least 10 per cent of this waste being  
6 baghouse dust. The RCRA Landfill Area is not fenced. The only  
7 public warning notice at the RCRA Landfill Area of the presence  
8 of hazardous substances is one sign and approximately fifty (50)  
9 feet of plastic barrier tape. The RCRA Landfill Area covers  
10 approximately 4.5 acres. The waste is buried to a depth of  
11 approximately 15 feet. Rainwater falling on the RCRA Landfill  
12 Area rapidly drains through and over the landfill to the south  
13 and southwest into an area having numerous sinkholes and fissures  
14 penetrating the coral bedrock. The RCRA Landfill Area is the  
15 subject of an administrative action brought by EPA against HWS  
16 and the Estate under RCRA.

17 13. The Beach Area is approximately 2.5 acres in area  
18 and contains a waste pile which is unfenced, unmarked and readily  
19 accessible. Tests have indicated that the Beach Area waste pile  
20 contains lead and cadmium in high amounts. The beach adjacent to  
21 the waste pile is used by surfers, picnickers and bathers.

22 14. All improvements at the Plant Area are owned by  
23 HWS. HWS has conducted manufacturing operations at the Plant  
24 since approximately 1958. HWS is a corporation organized under  
25 the laws of the State of Delaware, with its principal place of  
26 business located at the Plant Area. On November 29, 1991, HWS  
27 filed a voluntary petition for relief under Chapter 11 of the  
28 Bankruptcy Code.

29 15. The land at all three Areas is owned by the Estate  
30 of James Campbell (the "Estate"). The Estate leased the Plant  
31 Area to HWS beginning March 27, 1959 or earlier. The Estate  
32 permitted HWS to use the RCRA Landfill Area. The Estate is a  
33 testamentary trust estate formed under the laws of Hawaii, with  
34 its principal place of business located at 828 Fort St. Mall  
35 #500, Honolulu, Hawaii 96813.

#### 36 37 EPA CONCLUSIONS OF LAW

38 Based on the foregoing Findings, EPA has concluded that:

39 16. The Plant Area, the RCRA Landfill Area and the  
40 Beach Area are each a separate "facility" as defined by Section  
41 101(9) of CERCLA, 42 U.S.C. Section 9601(9). Such facilities are  
42 not contiguous. Reference herein to all three Areas as the  
43 "Site" shall not excuse the Respondent from any obligation under  
44 RCRA, CERCLA or any other law that applies to transportation or  
45 disposal of hazardous substances or hazardous wastes outside a  
46 particular site or facility.

1 17. The Respondent is a "person" as defined by Section  
2 101(21) of CERCLA, 42 U.S.C. Section 9601(21).  
3

4 18. HWS is now and was at the time of disposal of  
5 hazardous substances an "owner" and "operator" of the Plant Area,  
6 as defined by Section 101(20) of CERCLA, 42 U.S.C. Section  
7 9601(20). HWS was, at the time of disposal of hazardous  
8 substances, the "operator" of the RCRA Landfill Area and the  
9 Beach Area, as defined by Section 101(20) of CERCLA, 42 U.S.C.  
10 Section 9601(20).

11 19. The Respondent is therefore a liable person under  
12 Section 107(a) of CERCLA, 42 U.S.C. Section 9607.

13 20. Lead and cadmium are "hazardous substances" as  
14 defined by Section 101(14) of CERCLA, 42 U.S.C. Section 9601(14).

15 21. The disposal of baghouse dust and "Pilot Project"  
16 material at the Site as well as the presence of high total  
17 amounts and concentrations of lead and cadmium at the Site and  
18 the potential for those substances to migrate from the Site  
19 constitutes an actual or threatened "release" as that term is  
20 defined in Section 101(22) of CERCLA, 42 U.S.C. Section 9601(22).

#### 21 DETERMINATIONS

22 Based on the Findings of Fact and Conclusions of Law and  
23 based on the Administrative Record in this matter, the Director  
24 has made the following determinations:

25 22. The actual or threatened release of hazardous  
26 substances from the Site may present an imminent and substantial  
27 endangerment to the public health or welfare or the environment.

28 23. The actions required by this Order, if properly  
29 performed, are consistent with the National Contingency Plan  
30 (NCP), 40 CFR Part 300 and CERCLA; and are appropriate to protect  
31 the public health and welfare and the environment.  
32

33 24. The conditions present at the Site constitute a  
34 threat to public health or welfare or the environment based upon  
35 consideration of the factors set forth in the NCP at 40 CFR  
36 section 300.415(b).  
37

#### ORDER

38 Based upon the foregoing Findings, Conclusions and  
39 Determinations, and pursuant to Section 106(a) of CERCLA, 42  
40 U.S.C. Section 9606(a), it is hereby Ordered that the Respondent  
41 will undertake the following actions under the direction of EPA's  
42 On-Scene Coordinator. Without admitting such Findings,  
43 Conclusions and Determinations, Respondent agrees to undertake

1 the following actions under the direction of EPA's On-Scene  
2 Coordinator.

3 25. The Respondent shall restrict access to the Site  
4 and shall not allow any contaminated materials, equipment or any  
5 other item to be removed from the Site without prior EPA  
6 approval.

7 26. Within fourteen (14) calendar days after the  
8 effective date of this Order, the Respondent shall submit to U.S.  
9 EPA a Work Plan for the removal activities ordered as set forth  
10 below. The Work Plan shall provide a concise description of the  
11 activities to be conducted to comply with the requirements of  
12 this Order, and shall include a proposed schedule for  
13 implementing and completing the activities. EPA may approve,  
14 disapprove, require revisions or modify the Work Plan. Once  
15 approved or modified by U.S. EPA, the Work Plan shall be deemed  
16 to be incorporated into and made a fully enforceable part of this  
17 Order.

18 27. The Work Plan shall contain a site safety and  
19 health plan, a sampling and analysis plan, and a schedule of the  
20 work to be performed. The site safety and health plan shall be  
21 prepared in accordance with EPA's Standard Operating Safety  
22 Guide, dated November, 1984, and updated July, 1988, and with the  
23 Occupational Safety and Health Administration (OSHA) regulations  
24 applicable to Hazardous Waste Operations and Emergency Response,  
25 29 CFR Part 120. The Work Plan and other submitted documents  
26 shall demonstrate that the Respondent can properly conduct the  
27 actions required by this Order.

28 28. The Respondent shall retain a contractor qualified  
29 to undertake and complete the requirements of this Order, and  
30 shall notify U.S. EPA of the name of such contractor within five  
31 (5) days of the effective date of this Order.

32 29. Within twenty (20) calendar days after U.S. EPA  
33 approval of the Work Plan, the Respondent shall implement the  
34 Work Plan as approved or modified by U.S. EPA. Failure of the  
35 Respondent to properly implement all aspects of the Work Plan  
36 shall be deemed to be a violation of the terms of this Order.  
37 The Work Plan shall require the Respondent to perform, and  
38 complete within sixty (60) calendar days after approval, at a  
39 minimum, the following removal activities:

- 40 a. At the Plant Area: Construct runoff protection adequate  
41 to prevent surface water runoff from entering Drain A  
42 around the perimeter of the Plant Area. Safely  
43 containerize all loose, bagged or inadequately  
44 containerized baghouse dust and "Pilot Project"  
45 material and secure such materials from any further  
46 release into the environment.

1  
2           b.    At the RCRA Landfill Area: Consolidate on the main  
3 landfill all contaminated soil and sediments in the  
4 vicinity of the materials deposited by HWS on the west  
5 side of the street. Grade the site and stabilize the  
6 slopes for runoff to the south. Construct a cap atop  
7 the consolidated material, and protect the top of the  
8 cap with an impermeable layer adequate to prevent  
9 weathering of the cap. For site security, construct a  
10 six-foot chain link fence and post warning signs every  
11 100 feet around the perimeter.

12           c.    At the Beach Area: Enclose the site inside a  
13 continuous berm. For site security, construct a six-  
14 foot chain link fence and post warning signs every 100  
15 feet around the perimeter.

16           30.   The Respondent shall provide EPA with written  
17 weekly brief summary reports. These reports shall contain a  
18 summary of the previous week's activities and planned events.

19           31.   EPA shall be informed at least forty-eight (48)  
20 hours prior to any on-Site work.

21           32.   All sampling and analysis shall be consistent  
22 with the "Quality Assurance/Quality Control Guidance for Removal  
23 Activities": "Sampling QA/QC Plan and Data Validation  
24 Procedures," EPA OSWER Directive 9360.4-01, dated April, 1990.

25           33.   All actions taken under this Order by Respondnet  
26 shall be in conformity with the EPA Off-Site Policy (OSWER  
27 Directive 9834.11, November 13, 1987) in accordance with CERCLA  
28 Section 121(d)(3), 42 U.S.C. §9621(d)(3).

29           34.   On or before the fifth day after the effective  
30 date of this Order, the Respondent shall designate a Project  
31 Coordinator. To the greatest extent possible, the Project  
32 Coordinator shall be present on site or readily available during  
33 site work. The U.S. EPA has designated Robert M. Mandel as its  
34 On-Scene Coordinator. The On-Scene Coordinator and the Project  
35 Coordinator shall be responsible for overseeing the  
36 implementation of this Order. To the maximum extent possible,  
37 communication between the Respondent and the U.S. EPA, and all  
38 documents, reports, and approvals, and all other correspondence  
39 concerning the activities relevant to this Order, shall be  
40 directed through the On-Scene Coordinator and the Project  
41 Coordinator.

42  
43           35.   The U.S. EPA and the Respondent shall each have  
44 the right to change their respective designated On-Scene  
45 Coordinator or Project Coordinator. U.S. EPA shall notify the  
46 Respondent, and the Respondent shall notify U.S. EPA, as early as

1 possible before such a change is made, but in no case less than  
2 24 hours before such a change. Notification may initially be  
3 oral, but shall promptly be reduced to writing.

4 36. The U.S. EPA On-Scene Coordinator shall have the  
5 authority vested in an On-Scene Coordinator by the NCP, 40 CFR  
6 Part 300, as amended, including the authority to halt, conduct,  
7 or direct any work required by this Order, or to direct any other  
8 response action undertaken by U.S. EPA or the Respondent at the  
9 facility.

10 37. All instructions by the U.S. EPA On-Scene  
11 Coordinator or his designated alternate shall be binding upon the  
12 Respondent, subject to Respondent's right to seek dispute  
13 resolution.

#### 14 ON-SITE AND OFF-SITE ACCESS

15 38. EPA employees, contractors, agents, and  
16 consultants are authorized, and the Respondent shall permit such  
17 persons, to enter and freely move about all property at the Site  
18 during the effective dates of this Consent Order for the purposes  
19 of, inter alia, conducting inspections to determine compliance  
20 with this Order, including taking photographs and videotapes of  
21 the Site, doing cleanup/ stabilization work, interviewing Site  
22 personnel and contractors; inspecting records, operating logs,  
23 and contracts related to the Order, reviewing the progress of the  
24 Respondent in carrying out the terms of this Consent Order,  
25 conducting such tests, sampling or monitoring as EPA or its  
26 Project Coordinator deem necessary, verifying the reports and  
27 data submitted to EPA by the Respondent, and conducting other  
28 activities that EPA determines to be necessary or appropriate.  
29 The Respondent shall permit such persons to inspect and copy all  
30 records, files, photographs, documents, and other writings,  
31 including all sampling and monitoring data, that pertain to work  
32 undertaken pursuant to this Consent Order. The Respondent shall  
33 comply with all approved health and safety plans.

34 39. To the extent that work required by this Order, or  
35 by any approved Workplan prepared pursuant hereto, must be done  
36 on property not owned or controlled by the Respondent, the  
37 Respondent shall use its best efforts to obtain site access  
38 agreements from the present owner(s) or controller(s) of such  
39 property within ten (10) days after approval of any Workplan for  
40 which such access is required or any later date upon which the  
41 Respondent or EPA determine such access is necessary. Best  
42 efforts as used in this paragraph shall include, at a minimum, a  
43 certified letter from the Respondent to the present owners of  
44 such property requesting access agreements to permit the  
45 Respondent and EPA and its authorized representatives to access  
46 such property and payment of fair compensation to such person.  
47 Any such access agreement shall be incorporated by reference into



1 this Consent Order. In the event that agreements for access are  
2 not obtained in a timely manner, the Respondent shall notify EPA  
3 in writing within three (3) days thereafter regarding both the  
4 efforts undertaken to obtain access and its failure to obtain  
5 such agreements. In the event EPA obtains access, the Respondent  
6 shall undertake EPA approved work on such property.

7 40. Nothing in this section limits EPA's right of  
8 access and entry pursuant to applicable law, including RCRA and  
9 CERCLA.

#### 10 SAMPLING AND DATA/DOCUMENT AVAILABILITY

11 41. The Respondent shall submit to EPA the results of  
12 all sampling and/or tests or other data generated by, or on  
13 behalf of the Respondent, in accordance with the requirements of  
14 this Consent Order.

15 42. The Respondent shall notify EPA at least forty-  
16 eight (48) hours before engaging in any field activities, such as  
17 construction of caps or berms, well drilling, installation of  
18 equipment, or sampling. At the request of EPA, the Respondent  
19 shall provide or allow EPA or its authorized representative to  
20 take split samples of all samples collected by the Respondent  
21 pursuant to this Consent Order. Similarly, at the request of the  
22 Respondent, EPA shall allow the Respondent or its authorized  
23 representative(s) to take split or duplicate samples of all  
24 samples collected by EPA under this Consent Order. EPA will  
25 notify the Respondent at least forty-eight (48) before conducting  
26 any sampling under this Consent Order.

27 43. The Respondent may assert a business  
28 confidentiality claim covering all or part of any information  
29 submitted to EPA pursuant to this Consent Order. Any assertion  
30 of confidentiality shall be adequately substantiated by the  
31 Respondent when the assertion is made. Information determined to  
32 be confidential by EPA shall be disclosed only to the extent  
33 permitted by 40 CFR Part 2. If no such confidentiality claim  
34 accompanies the information when it is submitted to EPA, the  
35 information may be made available to the public by EPA without  
36 further notice to the Respondent. The Respondent agrees not to  
37 assert any business confidentiality claim with regard to any  
38 physical or analytical data.

39 44. The Respondent shall retain copies of all records  
40 and files relating to hazardous substances found on the Site for  
41 six years following completion of the activities required by this  
42 Order and shall make them available to the U.S. EPA prior to the  
43 termination of the activities under this Order and thereafter on  
44 request.  
45

1           45. The Respondent shall submit a final report  
2 summarizing the actions taken to comply with this Order. The  
3 report shall contain, at a minimum: identification of the  
4 facility, a description of the locations and types of hazardous  
5 substances encountered at the facility upon the initiation of  
6 work performed under this Order, a chronology and description of  
7 the actions performed (including both the organization and  
8 implementation of response activities), a listing of the  
9 resources committed to perform the work under this Order  
10 (including financial, personnel, mechanical and technological  
11 resources), identification of all items that affected the actions  
12 performed under the Order and discussion of how all problems were  
13 resolved, a listing of quantities and types of materials removed  
14 from the facility, a discussion of removal and disposal options  
15 considered for any such materials, a listing of the ultimate  
16 destination of those materials, and a presentation of the  
17 analytical results of all sampling and analyses performed and  
18 accompanying appendices containing all relevant paperwork accrued  
19 during the action (e.g., hazardous waste manifests, invoices,  
20 bills, contracts, permits). The final report shall also include  
21 an affidavit from a person who supervised or directed the  
22 preparation of that report. The affidavit shall certify under  
23 penalty of law that based on personal knowledge and appropriate  
24 inquiries of all other persons involved in preparation of the  
25 report, the information submitted is true, accurate, and complete  
26 to the best of the affiant's knowledge and belief. The report  
27 shall be submitted within 21 calendar days of completion of the  
28 work required by the U.S. EPA.

29           46. All notices, reports, and requests for extensions  
30 submitted under terms of this Order shall be sent by certified  
31 mail, return receipt requested, and addressed to the following:

32           one copy       Robert M. Mandel  
33                           On Scene Coordinator  
34                           U.S. EPA, H-8-3  
35                           75 Hawthorne Street  
36                           San Francisco, CA 94105

37           one copy       Roger Klein  
38                           Assistant Regional Counsel  
39                           U.S. EPA (RC-3-2) Office of Regional Counsel  
40                           75 Hawthorne Street  
41                           San Francisco, CA 94105

42           47. If any provision of this Order is deemed invalid or  
43 unenforceable, the balance of this Order shall remain in full  
44 force and effect.

1

2

- 11

26

31

38

41

1 All payments shall reference the name of the Site, the  
2 Respondent's name and address, and the EPA docket number of this  
3 Order. Copies of the transmittal of payment shall be sent  
4 simultaneously to the EPA Project Coordinator.

5 52. The Respondent may dispute EPA's right to the  
6 stated amount of penalties by invoking the dispute resolution  
7 procedures under this Consent Order. If the Respondent does not  
8 prevail upon resolution of the dispute, EPA has the right to col-  
9 lect all penalties that accrued prior to and during the period of  
10 dispute. If the Respondent prevails upon resolution of the dis-  
11 pute, no penalties shall be payable.

12 53. Neither the filing of a petition to resolve a  
13 dispute nor the payment of penalties shall alter in any way the  
14 Respondent's obligation to complete the performance required  
15 hereunder.

16 54. The stipulated penalties set forth in this Section  
17 do not preclude EPA from pursuing any other remedies or sanctions  
18 that may be available to EPA by reason of the Respondent's  
19 failure to comply with any of the requirements of this Consent  
20 Order.

#### 21 DISPUTE RESOLUTION

22 55. If the Respondent disagrees, in whole or in part,  
23 with any EPA disapproval or modification or other decision or  
24 directive made by EPA pursuant to this Consent Order, the  
25 Respondent shall notify EPA in writing of its objections and the  
26 basis therefore within seven (7) calendar days of receipt of  
27 EPA's disapproval, decision, or directive. Said notice shall set  
28 forth the specific points of the dispute, the position the  
29 Respondent is maintaining should be adopted as consistent with  
30 the requirements of this Consent Order, the basis for  
31 Respondent's position, and any matters which it considers  
32 necessary for EPA's determination. EPA shall provide to the  
33 Respondent its decision (which shall be made by the Chief of the  
34 Region 9 Field Operations Branch) on the pending dispute which  
35 shall be binding upon all parties to this Consent Order.

36 56. The existence of a dispute as defined herein, and  
37 EPA's consideration of such matters as placed into dispute shall  
38 not excuse, toll or suspend any compliance obligation or deadline  
39 required pursuant to this Consent Order during the pendency of  
40 the dispute resolution process.

41 57. Notwithstanding any other provisions of this  
42 Consent Order, any action or decision by EPA, including without  
43 limitation decisions of the Regional Administrator or his  
44 designate, pursuant to this Consent Order shall be considered a

1 "removal or remedial action" under Section 113(h) of CERCLA, 42  
2 U.S.C. Section 9613(h) and shall not be considered to fall within  
3 any of the listed exceptions to such Section 9613.

#### 4 FORCE MAJEURE

5 58. The Respondent shall perform the requirements of  
6 this Consent Order within the time limits set forth herein unless  
7 the performance is prevented or delayed by events which  
8 constitute a force majeure. The Respondent shall have the burden  
9 of proving such a force majeure. A force majeure is defined as  
10 any event arising from causes not foreseeable and entirely beyond  
11 the control of the Respondent that could not be overcome by due  
12 diligence and that delays or prevents performance by a date  
13 required by this Consent Order. Such events do not include  
14 increased costs of performance, changed economic circumstances,  
15 normal weather events, or failure to obtain federal, state, or  
16 local permits. A force majeure event shall include failure of  
17 the Bankruptcy Court to grant a motion seeking permission to take  
18 an action required by this Order, if (a) the approval of such  
19 Court is required for Respondent to take such action and (b)  
20 Respondent filed such motion in a timely manner and diligently  
21 pursued its approval.

22 59. As soon as possible but no later than five days  
23 after becoming aware of a force majeure, the Respondent shall  
24 orally notify EPA thereof, with a written notification to follow  
25 no later than five (5) days after the Respondent became aware.  
26 Such notice shall estimate the anticipated length of delay,  
27 including necessary demobilization and remobilization, its cause,  
28 measures taken or to be taken to minimize the delay, and  
29 estimated time for implementation of these measures. Failure to  
30 comply with the notice provision of this paragraph shall  
31 constitute a waiver of Respondent's right to assert a force  
32 majeure.

33 60. If EPA determines that a force majeure has  
34 occurred, EPA will extend, by a written notification to the  
35 Respondent, the time for performance of the relevant task(s) for  
36 a period equal to the delay that EPA finds has resulting from  
37 such circumstances. Such an extension does not alter the  
38 schedule for performance or completion of other tasks unless  
39 these are also specifically altered by EPA's notification. In  
40 the event the Respondent disagrees with EPA's determination or  
41 lack thereof regarding a force majeure, the Respondent may seek  
42 dispute resolution. This paragraph does not limit the right of  
43 Respondent to assert a defense of force majeure in any judicial  
44 action by the United States seeking stipulated penalties under  
45 this Order against Respondent.

1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2

62. Each person signing below certifies he is fully authorized to execute this Order and to bind the party he purports to represent to the terms and conditions of this Order.

63. EPA expressly reserves all rights and defenses that it may have, including the right both to disapprove of work performed by the Respondent pursuant to this Order.

65. EPA hereby reserves all of its statutory and regulatory powers, authorities, rights and remedies, both legal and equitable, judicial or administrative, under CERCLA, RCRA or any other law, and EPA does not covenant not to sue or grant any waiver or release against Respondent

- 14

- 1 c. based on Respondent's liability arising from the past,  
2 present or future generation, release, handling,  
3 storage, treatment, arrangement for disposal, disposal  
4 or transportation of, or any other action relating to,  
5 hazardous substances, hazardous wastes, hazardous  
6 constituents, pollutants or contaminants or other  
7 materials outside of the Site, or operation or  
8 ownership of a facility where any such activity took  
9 place (except as set forth in paragraph 64);  
10  
11 d. for costs incurred by the EPA as a result of the  
12 failure of Respondent to meet the requirements of this  
13 Order;  
14  
15 e. for damage to federal property located any place that  
the actions hereunder are being performed or elsewhere;  
16  
17 f. based on criminal liability;  
18  
19 g. based on liability for damage to natural resources as  
defined in CERCLA; or  
20  
21 h. for any violations of federal, state or local law that  
22 occur before, during or after implementation of the  
actions hereunder.

23 66. Notwithstanding any other provision of this  
24 Consent Decree, if conditions at or information concerning the  
25 Site, previously unknown to EPA, are discovered, then, the  
26 covenant not to sue set forth in paragraph 64 notwithstanding,  
27 (a) EPA may institute proceedings or issue an order seeking to  
28 compel Respondent to perform any additional response work at or  
29 emanating from the Site; and (b) EPA may institute proceedings  
30 against Respondent seeking reimbursement of any costs incurred by  
31 EPA for any response action hereafter undertaken under CERCLA or  
32 any other applicable law, relating to the Site.

33 67. Subject to paragraph 64, compliance by the  
34 Respondent with the terms of this Consent Order shall not relieve  
35 the Respondent of its obligations to comply with RCRA, CERCLA or  
36 any other applicable local, State, or Federal laws and  
37 regulations.

38 68. Subject to paragraph 64, this Order does not  
39 constitute a resolution of all issues in In re Hawaiian Western  
40 Steel Limited, Inc. and the James Campbell Estate, (Docket No.  
41 09-87-0006) (the "RCRA Administrative Action").

42 69. Unless Respondent is in full compliance with this  
43 Order, EPA may perform any portion of the work consented to  
44 herein or any additional site characterization, feasibility

1 study, and response/corrective actions as it deems necessary to  
2 protect human health and/or the environment.

3 OTHER CLAIMS

4 70. Nothing in this Consent Order shall constitute or  
5 be construed as a release from any claim, cause of action or  
6 demand in law or equity against any person, firm, partnership, or  
7 corporation (except Respondent, to the extent set forth in  
8 paragraph 64) for any liability it may have arising out of or  
9 relating in any way to the generation, storage, treatment,  
10 handling, transportation, release, or disposal of any hazardous  
11 constituents, hazardous substances, hazardous wastes, pollutants  
12 or contaminants found at, taken to, or taken from the Site or  
13 elsewhere.

14 OTHER APPLICABLE LAWS

15 71. All actions required to be taken pursuant to this  
16 Consent Order shall be undertaken in accordance with the  
17 requirements of all applicable local, state, and Federal laws and  
18 regulations. The Respondent shall obtain or cause its  
19 representatives to obtain all permits and approvals necessary  
20 under such laws and regulations.

21 INDEMNIFICATION OF THE UNITED STATES GOVERNMENT

22 72. The Respondent agrees to indemnify and save and  
23 hold harmless the United States Government, its agencies,  
24 departments, agents, and employees, from any and all claims or  
25 causes of action arising from or on account of acts or omissions  
26 of the Respondent or its agents, independent contractors,  
27 receivers, trustees, and assigns in carrying out activities  
28 required by this Consent Order. This indemnification shall not  
29 be construed in any way as affecting or limiting the rights or  
30 obligations of the Respondent or the United States under their  
31 various contracts.

32 AMENDMENT; INCORPORATION OF REPORTS; ETC.

33 73. This Consent Order may only be amended by  
34 agreement of EPA and the Respondent. Such amendments shall be in  
35 writing, be signed by all parties and shall have as their  
36 effective date the date on which they are signed by EPA following  
37 their signature by Respondent.

38 74. Any reports, workplans, specifications, schedules,  
39 and attachments required by this Consent Order are, upon written  
40 approval by EPA, incorporated into this Consent Order. Any  
41 noncompliance with such EPA-approved reports, workplans,  
42 specifications, schedules, and attachments shall be considered a



1 violation of this Consent Order and shall subject the Respondent  
2 to the stipulated penalty provisions included in this Consent  
3 Order.

4 75. No informal advice, guidance, waiver, extension,  
5 suggestions, or comments by EPA regarding reports, plans,  
6 specifications, schedules, and any other writing submitted by the  
7 Respondent will be construed as relieving the Respondent of its  
8 obligation to obtain written approval, if and when required by  
9 this Consent Order.

10 76. All days referred to herein are calendar days  
11 unless otherwise specified.

12 REIMBURSEMENT OF COSTS

13 77. Following the effective date hereof, EPA may  
14 submit to Respondents on a periodic or other basis payment  
15 demands containing accountings of response costs, including  
16 oversight costs, incurred by the U.S. Government with respect to  
17 the Site. Response costs shall include, but are not limited to,  
18 direct and indirect costs incurred by the U.S. Government in  
19 overseeing Respondents' implementation of the requirements of  
20 this Order, EPA response costs incurred before the effective date  
21 hereof, time and travel costs of EPA personnel and associated  
22 indirect costs, costs of preparing and negotiating this Order,  
23 contractor costs, sampling, compliance monitoring (including the  
24 collection and analysis of split samples), discussions regarding  
25 disputes that may arise as a result of this Consent Order, costs  
26 of review and approval or disapproval of reports and costs of  
27 redoing any of Respondent's tasks. Cost summaries provided by  
28 EPA, including EPA's certified Agency Financial Management System  
29 summary data (SPUR Reports) and EPA's Cost Documentation  
30 Management System Report (CDMS), shall serve as sufficient basis  
31 for payment demands.

32 78. Except as provided in the following paragraph,  
33 Respondent shall, within 30 days of receipt of each such demand,  
34 remit a certified or cashier's check for the amount of those  
35 costs. Interest shall accrue from the later of the date payment  
36 of a specified amount is demanded in writing and the date of the  
37 expenditure. The interest rate is the rate of interest on  
38 investments for the Hazardous Substances Superfund in section  
39 107(a) of CERCLA.

40 79. Respondent shall make all payments due hereunder  
41 by forwarding a check to:  
42 U.S. Environmental Protection Agency  
43 Region 9, Attn: Superfund Accounting  
44 P.O. Box 360863M  
45 Pittsburgh, PA 15251

1 All checks shall identify the name of the Site, the Site  
2 identification number, the account number and the title of this  
3 Order. A copy of the check and/or transmittal letter shall be  
4 forwarded to the EPA Project Coordinator.

5 80. Respondent agrees to limit any disputes concerning  
6 costs to accounting errors and the inclusion of costs outside the  
7 scope of this Consent Order. Respondent shall identify any  
8 contested costs and the basis of its objection. All undisputed  
9 costs shall be remitted by Respondent as set forth above. Within  
10 30 days of receipt of the demand, Respondents shall (a) pay any  
11 disputed costs into an escrow account administered by an  
12 independent trustee with instructions to hold such funds while  
13 the dispute is pending and pay the proceeds to the party  
14 determined to be correct in the dispute resolution process and  
15 (b) send EPA a copy of such instructions and the agreement with  
16 such trustee and evidence of such payment. Respondents bear the  
17 burden of establishing an EPA accounting error or the inclusion  
18 of costs outside the scope of this Consent Order.

19 TERMINATION AND SATISFACTION

20 81. The provisions of this Consent Order shall be  
21 deemed satisfied upon Respondent's receipt of written notice from  
22 EPA that the Respondent has demonstrated, to the satisfaction of  
23 EPA, that the terms of this Consent Order have been  
24 satisfactorily completed.

25 ACCESS TO ADMINISTRATIVE RECORD

26  
27 82. The Administrative Record supporting the selection  
28 of the response action for this Site will be available for review  
29 on normal business days between the hours of 9:00 a.m. and 5:00  
30 p.m. in the Office of Regional Counsel, United States  
31 Environmental Protection Agency, Region IX, 75 Hawthorne Street,  
32 16th Floor, San Francisco, California. Please contact Roger  
33 Klein, Assistant Regional Counsel, at (415) 744-1311 to review  
34 the Administrative Record. An index of the Administrative Record  
35 is attached hereto.

36 EFFECTIVE DATE

37 83. The effective date of this Consent Order shall be  
38 the date on which it is signed by EPA. Because this Order was  
39 entered with the consent of both parties, the Respondent waives  
40 any right it may have to request a hearing or conference.

41 IT IS SO AGREED AND ORDERED:  
42 Hawaiian Western Steel Ltd. Inc.

43 BY: [Signature] DATE: 2/24/92  
44 (Name, Title)

1 U.S. Environmental Protection Agency, Region 9

2 By: Heim Taka  
3 for Jeff Zelikson, Director  
4 Hazardous Waste Management Division

DATE: 2-24-92

1     Contacts:

2     Robert M. Mandel  
3     On Scene Coordinator  
4     Emergency Response Section (H-8-3)  
5     United States Environmental Protection Agency  
6     75 Hawthorne Street  
7     San Francisco, CA 94105

8     William J. Weis III  
9     Investigations and Enforcement  
10    Emergency Response Section (H-8-3)  
11    United States Environmental Protection Agency  
12    75 Hawthorne Street  
13    San Francisco, CA 94105

14    Roger Klein  
15    Assistant Regional Counsel (RC-3-2)  
16    Office of Regional Counsel  
17    United States Environmental Protection Agency  
18    75 Hawthorne Street  
19    San Francisco, CA 94105

20    Diane C. Bodine  
21    Off-Site Policy Coordinator (H-4-3)  
22    United States Environmental Protection Agency  
23    75 Hawthorne Street  
24    San Francisco, CA 94105